Filed 7/17/19 Kalani M. v. Super. Ct. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

KALANI M.,

Petitioner,

v.

THE SUPERIOR COURT OF SANTA BARBARA COUNTY,

Respondent,

SANTA BARBARA COUNTY CHILD WELFARE SERVICES,

Real Party in Interest.

2d Juv. No. B296608
(Super. Ct. Nos. 19JV00016, 19JV00017)
(Santa Barbara County)

Kalani M. (petitioner), biological mother of N.M. and K.A., seeks extraordinary writ relief from a March 22, 2019 order declaring the children to be dependents of the juvenile court

(Welf. & Inst. Code, § 300, subd. (b)(1))[1], bypassing reunification services for petitioner (§ 361.5, subd. (b)(13)), and setting the matter for a permanency planning hearing on July 16, 2019. (§ 366.26.) She contends the juvenile court erred when it denied her reunification services. Santa Barbara County Child Welfare Services (CWS), contends petitioner waived any objection to the order because she did not object in the juvenile court and instead submitted on the written reports. We conclude petitioner's contentions have not been waived but that the order bypassing services is supported by substantial evidence. We deny the writ.

Facts and Procedural Posture

Petitioner is the biological mother of N.M., born in July 2012, and K.A., born in March 2017. On November 12, 2018, petitioner was arrested for public intoxication. In connection with that arrest, she tested positive for morphine, THC, amphetamine and methamphetamine. The arresting Santa Barbara County sheriff's deputies noted that, at the time, petitioner was lethargic, her face was sunken, she had droopy eyelids and her pupils were abnormally constricted for the lighting conditions.

On November 13, 2018, real party in interest, CWS received a referral concerning the children and petitioner's substance abuse. The referral informed CWS that, "Often times, [petitioner] is really high and is unable to care for the children. [K.A.] is now having problems sleeping, constantly has diaper rashes and often not being fed. . . . The children are often dirty, their dirty hair is left uncombed and tangled with food [and]

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[1] All further statutory references are to the Welfare and Institutions Code.

other items. Their fingernails are dirty and they are unbathed. Their clothes and shoes are too small and dirty."

CWS social workers made unannounced home visits to petitioner on November 21, November 28, 2018 and January 3, 2019, but were unable to speak with her. They were finally able to meet with petitioner on January 9. During the meeting, petitioner misrepresented the circumstances of her November arrest and stated that, two days earlier, she had taken a drug test at Recovery Point, a local substance abuse treatment provider. The social worker later spoke with Recovery Point's program manager and determined petitioner's statement was untrue.

On January 15, 2019, CWS obtained a protective custody warrant authorizing the removal of both children from petitioner's custody. A social worker and police officers arrived at petitioner's home at 1:00 p.m. Petitioner's mother had to wake her up. When she came to the door, petitioner was "disheveled," "groggy" and "sweating profusely" even though the outdoor temperature was only 60 degrees. Petitioner was asked if she had recently used any substances and initially stated she had not. However, the police officer conducted a field sobriety test and determined petitioner was under the influence. Petitioner eventually admitted to consuming methamphetamine two days earlier.

In its Detention Report, prepared for the January 2019 detention hearing, CWS represented that it had had 10 prior contacts with petitioner concerning one or both of her children; nine of these were also related to petitioner's substance abuse. Six separate reports of general neglect were investigated by CWS between November 2015 and November 2018. Four of those

investigations were closed as unfounded; one was closed as "inconclusive," and the final report resulted in this dependency matter. Summaries provided by CWS of these prior referrals and contacts document many instances in which petitioner either falsely represented she had recently taken a drug test, or failed to take a drug test after promising to do so.

In addition, CWS determined that petitioner's criminal record includes three prior convictions of driving under the influence (DUI), in 2007, 2010 and 2016. Petitioner was placed on formal probation after the 2007 offense and ordered to complete a six-month DUI program. In 2010, she was granted probation and ordered to complete a second-offender DUI program. She completed the program in May 2012. After the 2016 offense, petitioner was again granted probation and required to complete an 18-month multiple offender DUI program.[2]

CWS also represented that it had offered "pre-placement preventative services" to petitioner including, "Front Porch Services (Community Resources to promote safe and effective parenting), Substance Abuse Treatment (Recovery Point and Project Preemie), Parenting Education (CALM), Individual/Family Counseling (CALM), [and] Team Decision Making Meeting (TDM)." The detention report does not document when these services were offered, petitioner's response to the referrals, or whether any of the services mentioned were offered to petitioner in connection with her prior DUI convictions.

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[2] The petition for extraordinary writ includes exhibits indicating that petitioner completed the 2007 program and was in compliance with the Multiple Offender Program as of March 4, 2019.

CWS does, however, conclude that the services were not successful because petitioner "continues to use substances, placing her children at risk of physical harm or illness."

Petitioner was present and represented by counsel at the detention hearing on January 22. Her counsel informed the court that petitioner would "be submitting on temporary detention, and request a [jurisdiction] only report." The trial court made the factual findings requested by CWS, adopted its recommendations, detained the children in an out-of-home placement and scheduled a jurisdiction hearing.

Petitioner agreed to continue the jurisdiction hearing from February 14, 2019 to March 5, 2019. At that hearing, petitioner's counsel requested the matter be set for a disposition hearing. The trial court scheduled the disposition hearing for March 22, 2019.

The Disposition Report prepared by CWS recommended that the children remain placed with a maternal great aunt, that petitioner "not be offered Family Reunification services" pursuant to section 361.5, subdivision (b)(13), and that the matter be set for a section 366.26 Selection and Implementation hearing. In describing CWS's interactions with petitioner, the report stated that a social worker had "referred [petitioner] to Recovery Point, for substance abuse testing and treatment" on January 4, 2019, before the children were removed from the home. The report also noted that CWS had been unable to reach petitioner by telephone for two days in early February. Petitioner later gave the social worker a contact number that did not have functioning voice mail and told the social worker she had not received mail sent to her by CWS.

On February 14, 2019, petitioner told the social worker that she was "enrolled in services at Central Coast Headway, which she had been ordered to complete several years ago after being convicted of driving under the influence." Petitioner said she was not enrolled in "random substance abuse testing or treatment." Although she had spoken to staff at a local treatment program, she was unsure whether she was willing to enter residential treatment. The social worker referred petitioner to another local program. Petitioner said she would contact that program. After this conversation, petitioner missed or arrived too late for two separate meetings with the social worker. On February 27, 2019, the social worker mailed petitioner a letter with referrals for substance abuse treatment, counseling services, and parenting education.

The Disposition Report concluded petitioner should be denied family reunification services because she "has an extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment over the course of twelve years. [Petitioner] has been ordered to engage in substance abuse treatment three separate times beginning in 2007. Despite engaging in services, she continued to abuse alcohol and received a second [DUI] conviction in 2010, and a third conviction in 2016. [Petitioner] has since started to abuse methamphetamine and has a pending charge of use/under the influence of a controlled substance. Since the removal of the children, the mother has not engaged in substance abuse treatment as recommended by [CWS] despite being referred to Recovery Point on January 4, 2019, and Project Preemie on February 14, 2019."

An addendum report summarized four contacts petitioner had with CWS between March 4, 2019 and March 21, 2019, the

day before the disposition hearing. Petitioner had arranged to enter treatment at Project Preemie but ultimately could not do so because she had not yet completed a required detox program. Her most recent drug test was positive for multiple substances. She had an appointment to enter detox on March 25, two days after the disposition hearing.

Petitioner was present at the disposition hearing on March 22. County counsel announced the parties had agreed to a "settlement" in which petitioner "[would] be resting on jurisdiction and submitting on disposition[,]" and that petitioner would be offered four hours of visitation per month with the children. Petitioner's counsel agreed, stating on her behalf that, "we'll be resting on jurisdiction and submitting on disposition with the offer of visitation that was so stated on the record by County Counsel."

The trial court found the factual allegations in the petition true. It also adopted CWS's recommendations, ordering that petitioner be bypassed for family reunification services under section 361.5, subdivision (b)(13). It scheduled the section 366.26 selection and implementation hearing for July 16, 2019. Petitioner timely filed her petition for extraordinary writ.

Contentions

Although the writ petition does not include points and authorities, we understand petitioner to contend the trial court abused its discretion when it bypassed family reunification services, that the order bypassing services is not supported by substantial evidence, and that petitioner received ineffective assistance of counsel in the trial court. CWS contends petitioner waived these objections by failing to raise them below and by

submitting on disposition. CWS further contends the trial court's orders are supported by substantial evidence.

Discussion

Wavier. CWS urges us to conclude petitioner has waived each of her contentions because, at the March 22 disposition hearing, her counsel informed the trial court, "we'll be resting on jurisdiction and submitting on disposition with the offer of visitation" made by county counsel. Petitioner's counsel also made similar statements at the preceding hearings.

A parent does not waive writ or appellate review of juvenile court orders by "submitting" on a report. (*In re Richard K.* (1994) 25 Cal.App.4th 580, 589.) Instead, when a parent "submits" on a detention, jurisdiction or disposition report, "the parent agrees to the court's consideration of such information as the only evidence in the matter." (*Ibid.*) It remains the juvenile court's task to "weigh evidence, make appropriate evidentiary findings and apply relevant law to determine whether the case has been proved. [Citation.] In other words, the parent acquiesces as to the state of the evidence yet preserves the right to challenge it as insufficient to support a particular legal conclusion. [Citation.]" (*Ibid.*) A parent may, however, waive writ or appellate review of a juvenile court order by submitting on the recommendations included in a report, rather than on the evidence included in the report. (*Ibid.*)

Here, petitioner's counsel submitted on the disposition report, not on CWS's recommendation. In doing so, petitioner invited the juvenile court to make its findings and order based solely on the content of the report. County counsel adopted the same stance, informing the court, "I will request the Court to consider all of the reports in the court file and then based on

those reports the parents will just rest as they do after closing usually in a case, and then Court, based on the reports, will make a decision."

Even if petitioner's counsel had submitted on the recommendations rather than on the report, we would be reluctant to find that petitioner had waived her objection that the order bypassing services was not supported by substantial evidence. In advocating for such a broad waiver, CWS is, in effect, contending that petitioner waived participation in reunification services. But the record cannot support that conclusion.

Section 361.5 provides that the juvenile court may not accept a parent's waiver of reunification services unless it first advises the parent of "any right to services and of the possible consequences" of the waiver, "including the termination of parental rights and placement of the child for adoption." (§ 361.5, subd. (b)(14)(B).) Before accepting the waiver, the juvenile court must also state "on the record its finding that the parent or guardian has knowingly and intelligently waived the right to services." (*Ibid.*)

No effort was made here to advise petitioner, on the record, that "submitting" on the disposition report would be treated as a waiver of her participation in reunification services. The juvenile court did not advise petitioner of the consequences of waiver or find that she knowingly and intelligently waived services. We conclude petitioner has not waived her contention that the order bypassing services was not supported by substantial evidence.

Order Bypassing Services. CWS and the juvenile court relied on section 361.5, subdivision (b)(13) to bypass reunification services for petitioner. She contends the order bypassing services

is not supported by substantial evidence. We disagree. The record contains substantial evidence that petitioner meets the statutory criteria for bypassing services. (*In re Brian M.* (2000) 82 Cal.App.4th 1398, 1401.)

Section 361.5, subdivision (b) provides, "Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, any of the following: . . . (13) That the parent . . . of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ." (§ 361.5, subd. (b)(13).)

"[A] parent who has failed to participate in drug or alcohol treatment ordered directly by the court as a condition of probation in a criminal case may be denied services under section 361.5, subdivision (b)(13) if the other criteria of that provision are met." (*D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 203.) Resistance to court-ordered treatment encompasses more than refusing to attend or participate in a program. "The parent also can passively resist by participating in treatment but nonetheless continuing to abuse drugs or alcohol, thus demonstrating an inability to use the skills and behaviors taught in the program to maintain a sober life." (*Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010.) Proof of resistance to treatment "may come in the form of dropping out of programs, or in the form of resumption of regular drug use after a period of sobriety." (*In re Brian M.*, supra, 82 Cal.App.4th at p. 1402, fn. omitted; see also *In re William B.* (2008) 163 Cal.App.4th 1220, 1230.)

CWS took petitioner's children into protective custody on January 15, 2019. In the three-year period immediately preceding that event, petitioner pleaded guilty to her third DUI offense within 10 years. The trial court in that matter granted probation on the condition, among others, that petitioner complete an 18-month multiple-offender DUI treatment program. Petitioner appears to have complied with that probation condition. The program did not, however, require her to take random substance abuse tests.

The record also contains substantial evidence that petitioner did not abstain from substance abuse after she was ordered to participate in the DUI program. In July 2018, petitioner appeared to be under the influence when a social worker arrived at her home to investigate a referral relating to drug use. In August 2018, petitioner admitted to a social worker that she was using both THC and alcohol. A drug test taken the next day was positive for THC. In November 2018, following the arrest for public intoxication that precipitated this matter, petitioner tested positive for multiple substances including morphine, THC, amphetamine and methamphetamine. In January 2019, when the social worker and a police officer came to her home to remove the children, petitioner admitted to the officer that she smoked methamphetamine two days before.

Petitioner was also dishonest with the social workers about her willingness to take random drug tests. The detention report documents at least seven instances, between July 2018 and January 2019, in which petitioner either claimed to have taken a drug test within the past two days or promised to take one the next day. On each occasion, petitioner had not tested or did not appear for the promised test.

Petitioner did not enter residential treatment or stop using illegal drugs after the children were removed from her care. The detention report states that CWS referred petitioner to substance abuse treatment and to individual counseling before the children were taken into custody. During an early March 2019 telephone conversation with a social worker, petitioner denied she used methamphetamine. Just one day before the March 22, 2019 disposition hearing, the program manager at a substance abuse treatment program informed the social worker that petitioner's enrollment in the program was delayed because she had tested positive for multiple substances.

Petitioner's substance abuse, after the 2016 order directing her to enter a multiple offender DUI program, was "extensive, abusive, and chronic," within the meaning of section 361.5, subdivision (b)(13). This conclusion is supported by the long list we have summarized above of petitioner's arrests, positive drug tests, dishonest statements about drug use and drug testing, and reluctance to enter residential treatment. The court properly found petitioner had resisted treatment within the three years preceding the filing of the petition and that section 361.5, subdivision (b)(13) applied to petitioner.

Ineffective Assistance of Counsel. Petitioner asserts that she received ineffective assistance of counsel because counsel did not challenge the evidence included in the CWS reports, did not file her declaration denying that she engaged in substance abuse, and did not preserve issues for appellate review.

The parent in a juvenile dependency proceeding is entitled to effective assistance of counsel. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 462-463.) To establish ineffective assistance, petitioner must demonstrate that her trial counsel's conduct fell

below an objective standard of reasonableness and that she was prejudiced because there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to petitioner would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619,703.) Petitioner has the burden to "prove prejudice that is a "'demonstrable reality," not simply speculation.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.) In reviewing an ineffective assistance claim, we give great deference to counsel's tactical decisions and do not second-guess them. (*People v. Weaver* (2001) 26 Cal.4th 876, 925-926.)

Petitioner's ineffective assistance claim fails because her petition does not establish either deficient performance or prejudice. The record sheds no light on why counsel did not file petitioner's declaration or otherwise challenge the evidence included in the CWS reports. Counsel may have made the reasonable tactical judgment that petitioner's declaration was not credible and that objections to CWS's evidence would be overruled. (See, e.g., *People v. Frye* (1998) 18 Cal.4th 894, 985, disapproved on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 420-421.) Because the present record sheds no light on counsel's reasoning, we cannot conclude the representation was ineffective.

Disposition

The petition for extraordinary writ is denied.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J. TANGEMAN, J.

Arthur A. Garcia, Judge

Superior Court County of Santa Barbara

Kalani M., in pro per., for Petitioner.

No appearance for Respondent.

Michael C. Ghizzoni, County Counsel, Lisa A Rothstein, Deputy Counsel for Real Party in Interest.